No. 14762.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Application of

BEN WASSERMAN,

for Admission to the Bar of the United States District Court, for the Southern District of California,

Appellant.

BRIEF OF AMICI CURIAE FOR THE COURT.

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This is an appeal from an Order made by the United States District Court for the Southern District of California, Honorable Leon R. Yankwich, Chief Judge presiding, denying Appellant's motion that he be admitted to practice generally as an attorney before the District Court.

Counsel filing this brief as *amici curiae* do so with the express permission of this Honorable Court and the full knowledge, consent and approval of the Chief Judge of the United States District Court for the Southern District of California.

I.

JURISDICTIONAL STATEMENT.

1. Basis of Jurisdiction of District Court.

The District Court had jurisdiction to determine whether Appellant should or should not be admitted to practice before it by virtue of 28 U. S. C. A., Sec. 1654 and Sec. 2071, Federal Rule of Civil Procedure 83, and Rule 1 of the Rules of the United States District Court for the Southern District of California, *infra,* pages 10-12 of this brief, and also by virtue of the inherent power possessed by all Constitutional courts to determine the moral and professional qualifications of those who apply for admission to practice before them.

2. Basis of Jurisdiction, if Any, of the Court of Appeals.

Whether this court has jurisdiction to review the ruling appealed from is doubtful and unsettled.

Pursuant to Rule 18, subparagraphs 2(b) and 3 of this court, counsel make the following jurisdictional statement with respect to the claimed jurisdiction of this court to entertain this appeal. We do not take any position on the question but leave the determination thereof to this court with the following observations. We have found no decisions of the Supreme Court, or of any Court of Appeals expressly holding that an Order of a United States District Court denying admission to practice law before it is appealable as a final decision. The only reported cases hold that such an Order is not appealable.

The Constitution of the United States, Article III, Sec-1, provides that "judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

Section 2 of Article III provides that "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority," and to all "cases" and "controversies" specifically enumerated therein.

Pursuant to these Constitutional provisions and by virtue of the Revised Judicial Code of 1948 (Act of June 25, 1948, c. 646, 62 Stat. 869, Title 28 of the United States Code) Section 1291, it is provided, in part:

> "§1291. *Final decisions of district courts*
>
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States,"

If this court has jurisdiction to review the Order appealed from, that jurisdiction must be conferred by Section 1291, *supra,* as a "final decision".

Although Appellant in his Opening Brief states that jurisdiction is claimed by virtue of 28 U. S. C., Section 1292, that section is clearly inapplicable as the Order appealed from is not an interlocutory order of the type therein described.

A "case" or "controversy", as used in Section 2 of Article III of the Constitution, is generally considered as meaning the claims of litigants brought for determination by regular judicial proceedings established by law or custom and involving a genuine adversary issue between opposing parties. See discussion and authorities cited in 1 Cyc. Fed. Proc., Sections 2.13 and 2.14.

In the case of *Brooks v. Laws* (CA DC), 208 F. 2d 18, the court held that an order of the District Court denying a motion for admission to practice law before the District Court was not a final decision under 28 U. S. C. A., Section 1291 and was not appealable. The court held that the denial of an application for admission to practice by the District Court was a *ministerial act* performed by virtue of a *judicial power* rather than a *judicial proceeding* and was therefore not appealable. The court, however, treated the appeal as an application for a writ of mandamus, held it to be insufficient, and affirmed the order denying the motion to admit.

In re Carter (CA DC, 1951), 192 F. 2d 15, the court held that an order of the District Court denying an application to engage in the bonding business was not an appealable order and interpreted the Supreme Court decision in *In re Summers,* 325 U. S. 561, 89 L. Ed. 1795, as regarding an order denying admission to practice law in Illinois as a ministerial act which presented a controversy reviewable by the Supreme Court. The *Summers* case basically holds that an order of the Supreme Court of a state denying an application for admission to practice law

in that state was a case or controversy where it was asserted that the denial was based solely on the ground that the applicant was a conscientious objector and that such denial violated the Fourteenth Amendment. The Supreme Court of Illinois held that the proceedings denying the prayer for admission were not judicial and the United States Supreme Court accepted this as a conclusive determination of Illinois law.

In *In re Jacobi* (CA DC, 1954), 217 F. 2d 668, the court again held that denial of an application for admission was not appealable.

Application of Fink (9 Cir., 1953), 208 F. 2d 898, this court expressly withheld deciding whether an order denying a motion to admit to practice before the District Court of Alaska was appealable as a final decision.

Application of Levy (5 Cir., 1954), 214 F. 2d 331, referred to the *Brooks* case, *supra,* as holding that denial of such petitions were non-appealable but did not decide for itself whether the matter was appealable because the applicant had refused to avail himself of an opportunity to present evidence on his right to admission.

The foregoing authorities are called to the attention of the court without any position being taken by counsel as to whether the order is or is not appealable as a final decision within the meannig of 28 U. S. C., Section 1291, inasmuch as counsel feel that it is desirable that the basic question of the power and jurisdiction of the District Court to determine the qualifications of attorneys who seek to practice before it should be settled.

II.
SUMMARY OF ARGUMENT.

1. All federal constitutional courts have inherent and statutory power to determine the qualifications of applicants to practice law before them.

2. Rule 1, subdivisions (b) and (d), of the Rules of the District Court, prescribing the qualifications for admission to practice before the District Court, are constitutional, reasonable and nondiscriminatory.

III.
ARGUMENT.

1. All Federal Constitutional Courts Have Inherent and Statutory Power to Determine the Qualifications of Applicants to Practice Law Before Them.

That the courts of each jurisdiction have inherent power to determine the qualifications of applicants for admission to the bar is well established.

In 5 Am. Jur. (Attorney at Law), Sec. 19, p. 273, this general rule, supported by overwhelming authority, is stated as follows:

> "§19. Generally.—Originally the courts alone determined the qualifications of candidates for admission to the bar, and this power still exists. It does not depend upon either the Constitution or statutes for its existence, but exists in all courts of record, unless restricted or taken away by express legislation. The courts have, however, generally acquiesced in all reasonable provisions relating to qualifications enacted by the legislature, so long as the rules and regulations prescribed are not unreasonable or do not deprive the courts of their inherent power to prescribe

other rules and conditions of admission to practice. The exercise of such power is held not to violate any constitutional or inherent prerogative of the court. There are, it is true, some courts which have taken the view that courts cannot add qualifications to those prescribed by the legislature, but must admit those shown to have the qualifications prescribed, but, as a general rule, the court will itself prescribe such other qualifications as may seem necessary to it in order to protect it, as well as the public at large, from persons of bad repute. In some jurisdictions the courts have even denied the existence of any power whatever in the legislature to prescribe what qualifications shall be prerequisite to admission of an attorney, especially if the legislature overrides the judicial department."

In *Application of Fink, supra,* this court said:

"The court below assumed it had inherent power to admit to practice, but declined, as it had a right to do, to exercise that power."

In *In re Secombe,* 60 U. S. 9, 19 How. 9, 15 L. Ed. 565, a petition for mandamus was sought to command the Judges of the Supreme Court of the Territory of Minnesota to vacate an order of that court removing Secombe from his office as an attorney of that court. The Supreme Court held that the determination of the qualifications of an attorney rested exclusively with the court involved and referred to an earlier case, saying (p. 13):

"The removal of the attorney and counsellor, in that case, *took place in a District Court of the United States, exercising the powers of a Circuit Court; and, in a court of that character, the relations between the court and the attorneys and counsellors who practise in it, and their respective rights and duties, are regulated by the common law. And it has been well*

settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor and for what cause he ought to be removed. The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court as the rights and dignity of the court itself."

In *Carver v. Clephane* (CA DC, 1943), 137 F. 2d 685, a proceeding brought in the District Court to compel the District Court's Committee on Admissions and Grievances to certify appellant for admission to the bar of the District Court, the District Court dismissed the complaint and on appeal the Court of Appeals affirmed, saying:

"The matter concerns the integrity of the court's bar. Within very wide limits, standards of fitness for membership in the bar of the District Court are for the District Court itself to establish and maintain."

In 7 C. J. S. (Attorney and Client), Sec. 7, p. 712, the rule supported by numerous authorities is stated to be:

"The right to admission to practice is governed in every jurisdiction by the local statutory and constitutional provisions and rules of court and compliance with these requirements is prerequisite to the practice of law. *The ultimate purpose of all regulations of the admission of attorneys is to assure the courts the assistance of advocates of ability, learning, and sound*

character and to protect the public from incompetent and dishonest practitioners.

"*In the federal courts,* the qualifications for admission are prescribed by court rules, and, generally, a member of the bar of a state is admissible on motion on a proper showing of compliance with the rules."

And in Section 11, page 717, it is said:

"The usage by courts of employing members of the bar to ascertain the qualifications and character of applicants for membership is reasonable and valid."

In 7 C. J. S., page 721, Section 15, it is said:

"The admission to practice of attorneys admitted in another jurisdiction is generally authorized and regulated by statutes and rules of court in most jurisdictions, and compliance therewith is essential. While an attorney admitted to practice in one state has no absolute or constitutional right to be admitted on motion as an attorney in other states, the courts of most jurisdictions have followed the practice of admitting attorneys, without examination, on certificate of admission to the highest courts of other jurisdictions and proof of practice therein for a prescribed time."

In *Chudoff v. McGranery* (3 Cir., 1950), 179 F. 2d 869, the court said:

"It appears that on May 9, 1949 Judge McGranery refused to permit Turner to enter a plea of 'not guilty' because he was represented by Mr. Chudoff. But on that date Mr. Chudoff was not entitled to appear on behalf of a client in the United States District Court for the Eastern District of Pennsylvania since he was not then a member of the bar of

that court and entitled to practice law therein. *No constitutional question is presented on this issue* for Mr. Chudoff, a member in good standing of the bar of the Supreme Court of Pennsylvania, prior to or upon May 9, 1949 could have become a member of the bar of the United States District Court for the Eastern District of Pennsylvania merely by having his admission moved therein and fulfilling other formal requirements. Mr. Chudoff effected membership to that bar without difficulty on May 16, 1949. *The admission of an attorney to practice at the bar of a court, while a formal matter, is nonetheless a prerequisite of practice before that bar.*"

To the same effect are *Booth v. Fletcher,* 101 F. 2d 676; *Application of Fink,* 109 Fed. Supp. 728, aff'd 208 F. 2d 898; *Brooks v. Laws, supra;* and *Laughlin v. Clephane* (D. C., D. C.) 77 Fed. Supp. 103.

In addition to this inherent power possessed by the courts of each jurisdiction, Congress has specifically provided:

"28 U. S. C. §1654. *Appearance personally or by counsel.*

"In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

It has been held that this statute confers exclusive jurisdiction on the United States District Courts for each district to determine and prescribe rules governing the qualifications of attorneys to practice before them. (*In re Shorter* (D. C. Ala., 1865), 22 Fed. Cases No. 12811; *Laughlin v. Clephane* (D. C., D. C., 1947), 77 Fed. Supp. 103; and *Brooks v. Laws, supra.*)

28 U. S. C. A., Section 2071, specifically confers upon the Supreme Court, all Courts of Appeal, and all District Courts, the power of prescribing rules for the conduct of the business of those courts. Section 2072 empowers the Supreme Court to prescribe general rules governing the practice and procedure in District Courts.

Pursuant to these statutes, Rule 83 of the Federal Rules of Civil Procedure, adopted and approved by the Supreme Court, provides:

> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

2. Rule 1, Subdivisions (b) and (d), of the Rules of the District Court for the Southern District of California, Prescribing the Qualifications for Admission to Practice Before the District Court, Are Constitutional, Reasonable and Nondiscriminatory.

Pursuant to the foregoing statutes and rules, the United States District Court for the Southern District of California adopted Rule 1 providing the qualifications for applicants for admisison to practice before that court. Rule 1 provides in part as follows:

> "(b) Attorneys—Admission: Attorneys residing within the State of California desiring to apply for admission to practice in this court shall be admitted only upon a written motion made in their behalf and

signed by a member of the bar of this court certifying that the applicant for admission is an active member, in good standing, of The State Bar of California and is a person of good moral character."

"(d) Non-Resident Attorneys: Only a member of the bar of this court may enter appearances for a party, sign stipulations or receive payment or enter satisfaction of judgment, decree or order. However any member in good standing of the Bar of any United States court, or of the highest court of any State or of any Territory or Insular possession of the United States, who has been retained to appear in this court, and who is not a resident of this district, or does not maintain an office in this district for the practice of law, may be permitted after application, without previous notice, to appear and participate in a particular case. Such applicant shall designate, in his application so to appear, a member of the bar of this court who maintains an office in this district for the practice of law, with whom the court and opposing counsel may readily communicate regarding the conduct of the case. He shall also file with such application the address, telephone number and written consent of such designee. Such permission to appear being a limited one, no certificate of admission shall be issued by the Clerk."

The form of written motion provided for by Rule 1(b) is as follows:

"Motion for Admission to Practice.

"This.....day of.....19.... I move the above-entitled Court to admit to practice as an attorney and counselor of said Court..... who I certify is now an active member, in good standing, of The State Bar of California.

"I vouch for applicant's good moral character,

....."

Under Rule 1(b) there are three requirements which an applicant for admission to practice must establish to the satisfaction of the District Court: (1) He must be a resident of California, (2) he must be an active member in good standing of the State Bar of California, and (3) he must be a person of good moral character.

Applicant failed to comply with the second requirement because he was not a member in good standing of the State Bar of California and had never been admitted to practice law in California.

Not having been admitted to practice in California, the appellant, if a non-resident of California, could be permitted by the District Court, after application, to appear and participate as counsel in a particular case upon complying with Rule 1(d).

A similar rule adopted by the United States District Court for the Southern District of New York was recently considered by that court in the case of *Piorkowski v. Arabian American Oil Company* (S. D., N. Y., 1955), 131 Fed. Supp. 553, where the court held that a non-resident attorney who was admitted to practice in the Southern District of New York but not in the State courts of New York, would be violating the penal law of New York if he maintained an office for the practice of law in New York.

The penal statute of New York, referred to in that opinion, is similar to the California law, Business and Professions Code, Sections 6125 and 6126. California Business and Professions Code, Section 6126, provides as follows:

> "§6126. *Unauthorized practice or advertising as misdemeanor.* Any person advertising himself as

> practicing or entitled to practice law or otherwise practicing law, after he has been disbarred or while suspended from membership in the State Bar, or who is not an active member of the State Bar, is guilty of a misdemeanor."

To be a member of The State Bar of California an attorney must possess the qualifications prescribed by California Business and Professions Code, Section 6060. That section requires that the applicant be a citizen of the United States, at least 21 years of age, of good moral character, a bona fide resident of California for at least three months prior to the date of the final bar examination and to have completed at least two years of college work or comply with the other requirements of that section, and to have taken and satisfactorily passed a final bar examination given by an examining committee.

Under Business and Professions Code, Section 6062, an attorney who has been admitted to practice law in another state may be admitted to practice in California if he possesses the same citizenship, age, good moral character and residence requirements prescribed by Section 6060, has been admitted to practice before the highest court of a sister state or of any jurisdiction where the common law of England constitutes the basis of jurisprudence and has been actively and substantially engaged in the practice of law in any such jurisdiction for at least four years out of the six years immediately preceding the filing of the application for admission and if he shall have taken and passed such examination as in the discretion of the examining committee may be required.

The record does not disclose that appellant qualified for admission to practice in California under either of these two sections.

There are many attorneys admitted to practice in sister states who have moved to California and been admitted to practice here under the provisions of Section 6062 by the taking and passing of the attorney's examination and establishment of the remaining qualifications.

There is nothing unconstitutional, arbitrary or unreasonable in a court requiring that an applicant to practice law shall possess learning in the law of that jurisdiction where he seeks admission. It is well known that different states have prescribed different qualifications and that the standards for admission to practice in the various states have generally been made higher.

The various federal courts have generally not conducted examinations as to the qualifications of applicants for admission but have adopted as a prerequisite the standards prescribed by the rules of the Court to which the application is made.

Thus in *Re Isserman* (1953), 345 U. S. 286, 287-288, 97 L. Ed. 1013, the Supreme Court not only recognized and approved of this practice but also recognized that there was no vested right in an individual to practice law. In that case Mr. Isserman had been a member of the bar of New Jersey and also of the United States Supreme Court. He was disbarred by the Supreme Court of New Jersey and thereupon a rule to show cause why he should not be disbarred was issued by the United States Supreme Court. The Supreme Court said:

> *"This Court (as well as the federal courts in general) does not conduct independent examinations for admission to its bar. To do so would be to duplicate needlessly the machinery established by the states whose function it has traditionally been to determine who shall stand to the bar.* Rather our rules provide

> for eligibility in our bar of those admitted to practice for the past three years before the highest court of any state. *The obvious premise of the rule is the confidence which this Court has in the bars maintained by the states of the Union.*
>
> * * * * * * * *
>
> "Disbarment by a state does not automatically disbar members of our bar, but this Court will, in the absence of some grave reason to the contrary, follow the finding of the state that the character requisite for membership in the bar is lacking (Selling v. Radford, 243 U. S. 46, 61 L. ed. 585, 37 S. Ct. 377, Ann. Cas. 1917D 569 (1917)). But we do not follow the rule used in some state courts that disbarment in a sister state is followed as a matter of comity."

And again the Supreme Court said:

> *"There is no vested right in an individual to practice law.* Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice."

Thus, the United States Supreme Court has expressly recognized and approved of the practice adopted by the various federal courts whereby admission to practice before the highest court of the state in which the applicant resides is a prerequisite to admission, and that each Court has the right to determine by rule or otherwise what the required qualifications shall be.

Appellant has cited no authority holding that Rule 1(b) and (d) of the District Court is unconstitutional, unreasonable or arbitrary.

In *Ex parte Garland,* 4 Wall. 378, 18 L. Ed. 370, the Supreme Court said:

> "The profession of an attorney and counselor is not, like an office, created by Congress, which depends for its continuance, its powers and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counselors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. *They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character;* . . . they hold their office during good behavior and can only be deprived of it for misconduct ascertained and declared by the judgment of the court, after opportunity to be heard has been offered."

In *Bradwell v. Illinois,* 16 Wall. 130, 83 U. S. 130, 21 L. Ed. 442, Mrs. Bradwell, a resident of Illinois, applied to the Judges of the Supreme Court of that state for a license to practice law. The Illinois Constitution limited the right to practice law to males. She argued that the denial of the license violated the second section of the Fourth Article of the Constitution of the United States, and the Fourteenth Amendment to the Constitution. In rejecting these arguments the Supreme Court said:

> "As regards the provision of the Constitution that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, the plaintiff in her affidavit has stated very clearly a case to which it is inapplicable.

"The protection designed by that clause, as has been repeatedly held, has no application to a citizen of the state whose laws are complained of. If the plaintiff was a citizen of the state of Illinois, that provision of the Constitution gave her no protection against its courts or its legislation.

* * * * * * * *

"In regard to that Amendment counsel for the plaintiff in this court truly says that there are certain privileges and immunities which belong to a citizen of the United States as such; otherwise it would be nonsense for the 14th Amendment to prohibit a state from abridging them, and he proceeds to argue that admission to the bar of a state, of a person who possesses the requisite learning and character, is one of those which a state may not deny.

"In this latter proposition we are not able to concur with counsel. We agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a state is forbidden to abridge. *But the right to admission to practice in the courts of a state is not one of them.* This right in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any state or in any case to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in the state and Federal courts, who were not citizens of the United States or of any state. But, on whatever basis this right may be placed, so far as it can have any relation to citizenship at all, it would seem that, as to the courts of a state, it would relate to citizenship of the state, and as to Federal courts, it would relate to citizenship of the United States."

To the same effect is *In re Lockwood,* 154 U. S. 117, 38 L. Ed. 930.

In this case Mr. Wasserman claims to be a citizen and resident of California and the holding of the above cases is applicable.

In *Mitchell v. Greenough* (9 Cir., 1938), 100 F. 2d 184, this Court said:

> "We pause here to observe that the right to practice law in the state court has been held by the Supreme Court not to be a privilege granted by the Federal Constitution or laws. Bradwell v. State of Illinois, 16 Wall. 130, 21 L. Ed. 442; *Ex parte* Lockwood, 154 U. S. 116, 14 S. Ct. 1082, 38 L. Ed. 929. In Green v. Elbert, 8 Cir., 63 F. 308, the Circuit Court of Appeals held that the conspiracy to deprive a lawyer of his rights to practice law in the state courts was not a conspiracy to interfere with any right or privilege 'granted, secured or protected by the Constitution of the United States.'"

In *Brents v. Stone* (D. C., E. D. Ill., 1945), 60 Fed. Supp. 82, the plaintiff sought declaratory judgment against the Justices of the Illinois Supreme Court to the effect that the statute, and rules adopted by the Court, governing admissions to the bar in Illinois deprived him of the right to practice law which he asserted was a privilege guaranteed and protected by the Federal Constitution. The Court, in rejecting this argument, said:

> "Nor can the action be sustained as one to secure protection of civil rights under the Federal Constitution, *for a license to practice law is not a privilege within the purview of any constitutional provision.* Mitchell v. Greenough, 9 Cir., 100 F. 2d 184, rehearing denied 9 Cir., 100 F. 2d 1006; certiorari denied 306 U. S. 659, 59 S. Ct. 788, 83 L. Ed. 1056;

Bradwell v. Illinois, 16 Wall. 130, 83 U. S. 130, 21 L. Ed. 442; *In re* Lockwood, 154 U. S. 116, 14 S. Ct. 1082, 38 L. Ed. 929. The police power of Illinois extends to the control of every action and event on the part of its citizens having to do with the public welfare. *It is well within the prerogatives of the commonwealth to prescribe regulations founded on nature, reason and experience for the admission of qualified persons to professions and callings demanding special skill.* In pursuance of this power the state has seen fit to prescribe *certain reasonable requirements for admission to the bar, including an examination as to fitness to practice law.* In the absence of averment and proof of unreasonable or arbitrary action, no citizen has ground for complaint. Bradwell v. Illinois, 16 Wall. 130, 83 U. S. 130, 21 L. Ed. 442, affirming *In re* Bradwell, 55 Ill. 535."

In *Application of Levy* (5 Cir., 1954), 214 F. 2d 331, it is held that a United States citizen has no constitutional right to practice law in the Federal Courts.

In *Keeley v. Evans* (D. C. Ore., 1921), 271 Fed. 520, it is held that there is no right, privilege or immunity involved in the action of a state court in refusing to admit to practice law before it an applicant who is licensed to practice before the Court of a different state, and that there is no violation of the equal protection clause in that the applicant, like all other persons wishing to be admitted to practice, can be required to show to the satisfaction of the Court his moral and professional fitness.

In *Emmons v. Smitt* (E. D. Mich., 1944), 58 Fed. Supp. 869, aff'd (6 Cir., 1945), 149 F. 2d 869, it is held that the right to practice law is not a property right nor is it a privilege or immunity secured by the Federal Constitution.

In *State v. Rosencrans* (1910), 30 R. I. 374, 75 Atl. 491, 498-500, aff'd *per curiam* (1912) 225 U. S. 698, the defendant in a criminal case was charged with practicing dentistry without a license. He contended that the Rhode Island statute requiring him to be licensed even though he had been previously licensed in other states was unconstitutional under the privileges and immunities, the full faith and credit, and the due process clauses of the Constitution. The Court held that the statute did not violate any of these clauses and stated:

> "There is nothing in either of these sections of the statute *which* directly or indirectly *prevents the certificates* of boards of registration in dentistry *of other states from being accepted in this state as evidence of the fact that the person holding those certificates is a duly registered dentist in the state from which the certificate issued.* That is all the faith and credit which under the opinions in this state is required to be given such records by this provision of the federal Constitution. *No state has such extra-territorial jurisdiction that it can by its certificate confer upon the person named therein the right to practice his profession in another state.*"

The above authorities establish that the Courts of each jurisdiction have the power to determine the legal and moral qualifications of those seeking the right to practice before them.

Although Appellant asserts that the District Courts in the several districts are in effect branches of one nation-wide District Court, such is not the fact. Under 18 U. S. C., Sections 132 and 133, it is provided that there shall be a District Court in each judicial district known as the United States District Court for that district and

that the President shall appoint "district judges for the several districts."

The Federal District Courts for the several districts are not branches of one nation-wide District Court, but each has been specially created pursuant to constitutional authorization and each is separate from the other. The Federal District Courts in the different states are foreign to each other in as full a sense as are state courts of different jurisdictions. (*United States v. Bink* (D. C. Ore., 1947), 74 Fed. Supp. 603, 607-608, and authorities there cited.)

Each Federal District Court in each judicial district has jurisdiction throughout and territorially coextensive with that district and no one District Court has any power to prescribe rules governing the District Courts of other districts. (36 C. J. S. p. 507, Sec. 303.)

It is well established that an applicant for admission to the practice of law must possess the requisite ability and legal learning, to test which he must submit himself to an examination either by the Court itself or by duly appointed examiners. A wide discretion is vested in the examiners and the exercise of that discretion is generally not reviewed by the Courts, unless there is a clear abuse thereof. (7 C. J. S. 716, Sec. 10, citing *In re Ellis,* 203 Pac. 967, 118 Wash. 484; *Rosenthal v. State Bar Examining Committee,* 165 Atl. 211, 116 Conn. 409, 87 A. L. R. 991; *In re Wilson,* 253 P. 2d 433, 435, 76 Ariz. 419, and other authorities.)

The District Court by Rule 1(b) has in effect determined and selected the Supreme Court of the State of California as an examining Court to determine the qualifications of those who should be admitted to practice in California.

The State Bar of California does not admit applicants to practice in the State courts. It only investigates the legal and moral qualifications of applicants as "an arm of the Court" and recommends to the Supreme Court whether the applicants possess the required legal learning and moral character to become members of the bar. The final determination of qualifications is made by the Supreme Court itself. Any applicant who is dissatisfied with the refusal of the Committee of Bar Examiners to certify him for admission to practice law, may have the Committee's action reviewed by the Supreme Court. (Cal. Bus. and Prof. Code, Sec. 6066; *In re Investigation of Conduct of Examination for Admission to Practice Law,* 1 Cal. 261; 6 Cal. Jur. 2d (Attorneys at Law), Secs. 15, 20, 22, 41-44, pp. 143, 147-149, 175-178.)

There is nothing arbitrary or unreasonable in requiring that an applicant for admission to practice law in a United States District Court in California shall possess learning in the laws of California and be required to pass an examination thereon.

Knowledge of the laws of the state in which the District Court is situated is essential because the State law is the rule of decision in the Federal Court for that district except in a limited class of cases. (28 U. S. C. A., Sec. 1652.)

Since, except where the Federal Constitution, statutes or treaties otherwise require, the applicable state law constitutes the rule of decision in the Federal Court not only as to the statutes of that state but also as to the non-statutory law (*Erie Railroad Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188; *Angel v. Bullington,* 330 U. S. 183, 91 L. Ed. 832), a rule, such as Rule 1(b) of the District

Court, requiring learning in California substantive law, is reasonable.

The rule that the State law governs in Federal cases where it is applicable and where the Federal Constitution, statutes or treaties are not applicable, is followed with respect to rights and privileges, interests in property, causes of action and liabilities, injuries to rights, negligence or contributory negligence, rights under, and the construction of contracts. See cases collected in 3 Cyc. Fed. Proc. (3rd Ed.), Sec. 6.12, and 28 U. S. C. A., Sec. 1652.

In 3 Cyc. Fed. Proc. (3rd Ed.), Secs. 6.13 and 6.14 it is stated that in cases in the Federal courts under the Federal Tort Claims Act, the Federal Employers' Liability Act, and the Bankruptcy Act, the law of the State must be applied in determining the rights and liabilities of the respective litigants and their property rights.

Appellant refers to attorneys practicing bankruptcy law, patent law and tax law as though a separate branch of Federal law was applicable. But in these cases the property rights of the litigants are governed by the State law and the contracts involved in patent, bankruptcy and tax cases are interpreted and governed by the State law. See authorities collected in 35 C. J. S. (Federal Courts), Sections 165-180.

Moreover, an attorney admitted to practice in the United States District Court for the Southern District of California, under Rule 1(b), does not receive a license

limiting his practice to those specific types of cases involving a Federal question or a specific kind of case, such as admiralty, patent, bankruptcy, or tax litigation. His license is general and entitles him to practice all types of law including those cases where the state law of California is the rule of decision. A rule which requires learning in the California substantive law as a prerequisite to admission to practice before a Federal District Court in California is certainly reasonable and within the power of the Court to adopt.

In his Brief Appellant cites various provisions of the United States Constitution as being violated by the rule of the District Court (Br. pp. 8-10) but he fails to cite any authorities supporting his statements.

The case of *Cummings v. Missouri,* 4 Wall. 321, 71 U. S. 277, 18 L. Ed. 356, was one in which the defendant, a Roman Catholic priest, was convicted for performing his duties as a priest without having taken a certain loyalty oath. The Supreme Court held that the test oath imposed by the Missouri Constitution was void as a bill of attainder or *ex post facto* law.

Appellant in his brief, pages 11-12, quotes from *Bradwell v. Illinois,* 16 Wall. (U. S.) 130 and says "in that case it was therein stated." The quoted language is not a part of the opinion of the Supreme Court. On the contrary, the statements there quoted in Appellant's Brief are a part of the argument of the attorney for the plaintiff in error. This is manifest from the report of the case in 21 L. Ed. 442, at 443.

In each of the cases cited by Appellant in his Brief, pages 12 and 13, the Court expressly recognized that it rested exclusively with the courts to determine who is qualified to become one of its officers as an attorney.

At page 16 Appellant states that "There is nothing to stop the Court from setting up its own investigating body to determine the character, learning and ability of the applicant seeking admission." That is exactly what the Court has done by the provisions of Rule 1. It has determined that the investigating body shall be the State Board of Bar Examiners and that when that Board's recommendations have been accepted and approved by the Supreme Court of California they will be accepted by the District Court as a determination of the character, learning and ability of the applicant. This practice has been expressly approved by the United States Supreme Court in *In re Isserman, supra.* The provisions of the California law governing admissions to practice have been held not to constitute an unconstitutional delegation of power (*Barton v. State Bar,* 209 Cal. 677) or a violation of Section 1 of Article III of the State Constitution relative to the distribution of governmental powers. (*In re Shattuck,* 208 Cal. 6; 6 Cal. Jur. 2d 141-143, 148, 173, 175-178.)

In his Brief Appellant makes reference to well-known judges who would be required to qualify under Rule 1 in order to practice law in California in the Federal courts. Those judges, if they resigned or retired from the bench and desired to practice law in California, would have

the right to apply for admission to practice in the State courts of California by taking the attorney's examination. California Business and Professions Code, Section 6062, subdivision (e), provides that in the case of out-of-state attorneys, teaching in a law school accredited by the Committee and services as a judge of a court of law shall be considered the practice of law within the meaning of that section. The qualifications of judges of Federal courts are determined by the Congress and are not for consideration in this proceeding.

With respect to Appellant's comments upon young attorneys admitted to practice in the Federal courts by reason of the fact that they have been admitted in the California state courts, it is sufficient to say that it is for the Court to determine the standards of qualifications. Those attorneys have taken and passed an examination as to their legal and moral qualifications. The Appellant has the privilege of doing the same. If Appellant, as implied in the Brief, is a well-trained and experienced lawyer of Federal practice, and if he meets the requirements of California Business and Professions Code, Section 6062, and has actively and substantially engaged in the practice of law in any jurisdiction or jurisdictions where the common law of England constitutes the basis of jurisprudence for at least four out of the six years immediately preceding the filing of his Application, we wonder why he has not applied for admission to practice law in California. If he meets the test he would be admitted, if he does not meet the test he would not be.

IV.

TREATED AS A PROCEEDING FOR LEAVE TO FILE A MOTION FOR WRIT OF MANDAMUS, THE MOTION SHOULD BE DENIED.

If the proceeding before this Court be treated as an application for a writ of mandamus, it is clearly insufficient under the well-established rules governing the issuance of such writs under 28 U. S. C. A., Section 1651.

It is well established that mandamus is an extraordinary writ reserved for extraordinary cases, to be used sparingly and only under exceptional circumstances. (*Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041.) A petition for a writ of mandamus should allege facts clearly showing that the lower court is acting clearly without jurisdiction, that a plain legal duty rests on the respondent to perform the acts sought to be performed, that the petitioner is entitled to have that duty performed, that the respondent has refused or failed to perform the act in question, and that the petitioner has no adequate or ordinary remedy at law. Mandamus will not issue to a subordinate judicial tribunal to exercise its judicial functions and perform its judicial duties, or exercise its judicial discretion in a particular way or manner, or to reach a designated conclusion, or make a particular decision, or to reverse or change a conclusion reached or decision made by it on a question within its jurisdiction. (*Roche v. Evaporated Milk Association,* 319 U. S. 21, 87 L. Ed. 1185; *Bankers Life & Casualty Company v. Holland,* 346 U. S. 379, 98 L. Ed. 106; 55 C. J. S. (Mandamus), Sections 51, 71 and 265.)

If it is asserted that the lower court has abused its judicial power the petitioner must establish a clear abuse of that power. It is within the sound discretion of the Court of Appeals to determine whether it should exercise its discretion to entertain the application for the writ. (*Brooks v. Laws, supra;* Application of Williams (9 Cir.), No. 14894 decided Nov. 8, 1955, not reported; O'Brien Manual of Federal Appellate Procedure, 3rd Ed., p. 251, Rules 30 and 31 of the United States Supreme Court.)

It is respectfully submitted, for the reasons above set forth, that the appeal should be denied, and the Order affirmed if it be an appealable Order, and the application for writ of mandamus dismissed if the proceeding be treated as such an application.

Respectfully submitted,

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